

8

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FEDERAL MINING & SMELTING
COMPANY, A Corporation.

Plaintiff in Error.

vs.

C. H. HODGE,

Defendant in Error.

NO. 2325

BRIEF OF PLAINTIFF IN ERROR UPON WRIT OF
ERROR TO UNITED STATES DISTRICT COURT
OF THE DISTRICT OF IDAHO, NORTHERN
DIVISION.

FEATHERSTONE & FOX,
Wallace, Idaho,
Attorneys for Plaintiff in Error

WALTER F. MORRISON,
Coeur d'Alene, Idaho,

ROBERTSON & MILLER,
Spokane, Washington,
Attorneys for Defendant in Error

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE FEDERAL MINING & SMELTING
COMPANY, A Corporation,

Plaintiff in Error.

vs.

C. H. HODGE,

Defendant in Error.

NO. 2325

BRIEF OF PLAINTIFF IN ERROR UPON WRIT OF
ERROR TO UNITED STATES DISTRICT COURT
OF THE DISTRICT OF IDAHO, NORTHERN
DIVISION.

FEATHERSTONE & FOX,

Wallace, Idaho,

Attorneys for Plaintiff in Error

WALTER F. MORRISON,

Coeur d'Alene, Idaho,

ROBERTSON & MILLER,

Spokane, Washington,

Attorneys for Defendant in Error

STATEMENT OF THE CASE.

The defendant in error, C. H. Hodge, the plaintiff below, sustained an injury on the 7th day of May, 1912, while in the employ of the Federal Mining & Smelting Company, the plaintiff in error, defendant below, in the Last Chance Mine, one of the properties of the plaintiff in error, situate at Wardner, Shoshone County, Idaho. The defendant in error had a complete recovery. (Tr. pp. 39-40.)

The accident occurred while the defendant in error was riding, in a sitting position, upon the bail and cable of a small skip operated in an incline hoistway or shaft in the said Mine, (the incline of this hoistway being about 45 degrees.)

In order to readily understand how this accident occurred it will be necessary to briefly describe the skip and the method of its operation as also in a general way the surroundings. The skip is a little car about 8 feet long and 3 feet wide, which has four wheels that run upon "T" rails. To the top of the skip is attached what is known as a bail, similar to the ordinary bail or handle of a pail. This bail is made of an iron rod about an inch in thickness and is bent in semi-circular shape and would extend about a foot or a foot and a half above the skip. To this bail is attached a cable which passes up the skipway and over a wheel known as a sheave wheel situate at the top of the skipway, and from thence down the skipway again to the drum of a small hoist which is situate on the Swneeney level. The hoist is operated by compressed air. There was no indicator upon the hoist. The only system of signalling provided for the purpose of hoisting and lowering the skip in this skipway was what is known as a "flashlight" system. This consists of a number of sixteen candle power electric lights, one of which is installed at the

hoist, and one at each of the levels, the lights being all connected in a circuit and flashed by means of a cord provided at each level and strung for a distance of about 4 feet lengthwise the incline at the levels, and within easy reach of persons riding upon the skip. This cord is used, both by the men riding upon the skip and such as may be standing at the stations to signal the engineer. When the cord is pulled all the lights go out momentarily and in this way the signal is flashed to the engineer. To prevent the skip from being drawn into the sheave wheel there is placed across the skipway, and between the upper or Number 4 level and the sheave wheel, a piece of timber known as a bulkhead or sheave timber which is about sixteen inches in diameter. (Tr. pp. 41-42-43.) The skipway or raise starts from the Sweeney level and is about 500 feet long. There are two more levels leading into this skipway which are above the Sweeney level, namely, the Numbr 5 or intermediate, and the Number 4 or top level. The skip accommodates five men only, and in case six men endeavor to ride upon it, it is necessary for one of them to sit upon the bail and cable. (Tr. p. 48.)

The men would arrange themselves as follows: Three men would stand on the lower deck and lean against the skip, two stood on the upper deck, which is a piece of timber fastened across the skip about midway. These men also leaned against the skip as the grade of the raise or skipway (about 45 degrees) did not permit of them standing erect, and the sixth man rode sitting on the bail, leaning against the cable, with his feet braced against the top of the skip. This was the position assumed by the defendant in error at the time of the injury (Tr. pp. 47-61-80-84.)

Riding in this position from the Sweeney level the skip was drawn to the Number 5 or intermediate level and the two men

got off. (Tr. p. 50.) At this point defendant in error, had he wished, could have taken a position in the body of the skip. (Tr. p. 50), but he did not do so and the skip was hoisted further. In passing the Number 4 or top level the skip was being drawn so fast that witness Chism could not give a proper signal to stop (Tr. pp. 44-45), and the engineer says that he did not receive any signal (Tr. p. 77). Consequently the skip was drawn past the Number 4 level and into the bulkhead or sheave timber where it stopped. The defendant's leg was pinned in beneath the sheave timber and the skip, and thus the injury occurred (Tr. p. 60-80). The cable did not break (Tr. p. 77). Nobody upon the skip was injured (Tr. pp. 50-51), and had the defendant in error sat in the body of the skip he would not have been injured (Tr. p. 51). His injury was due to the fact that he sat and rode upon the bail and cable instead of in the body of the skip as the other men did.

It is the contention of the plaintiff in error that in voluntarily riding upon the bail and cable of this hoist, the defendant in error assumed what was obviously the most dangerous place that could have been chosen by him, the place where the doctrine of chances would not permit of his riding a given number of times without injury. But further than this, in so doing he was violating a penal statute of the State of Idaho (hereinafter set out verbatim) which positively prohibits everyone from riding upon the bail or cable of any skip. The defendant in error sought to justify his taking this obviously dangerous position, and to excuse his violation of the positive inhibition of this statute, by showing that a custom had existed among the miners of riding on the bail and cable. The jury returned a verdict for the defendant in error in the sum of \$1,000.00 and judgment was entered thereon. To review the judgment this writ or error is brought.

It is contended by the plaintiff in error:

First: That the accident would not have happened but for the fact that the defendant in error assumed this obviously dangerous position in violation of law and that therefore the action of the defendant in error in this respect constitutes negligence *per se* which bars his recovery.

Second: That the Court erred in permitting the introduction, on behalf of the defendant in error, of evidence that a custom existed among the miners of riding on the bail and cable and of violating this law, and that the Court, in this respect, erred in instructing the jury that they should take such evidence into consideration in coming to their conclusion as to whether or not the defendant in error acted as a reasonable and prudent man in assuming such a position.

Third: That the Court erred in admitting evidence as to the insufficiency of the signalling system.

Fourth. That the Court erred in admitting evidence to the effect that the cable was defective.

Fifth: That the proximate cause of the accident was the negligence of a fellow servant, to-wit, of the hoistman in running the skip so fast past the Number 4 level that it was difficult for the men upon the skip to give the signal to stop.

ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination, with reference to the custom existing as to the number of men who should ride upon the skip, to-wit:

Q. Any custom?

for the reason that the defendant was not bound by any such

custom, if the same existed, and was not bound even by a direction to the men that any particular number should ride upon the said skip. Which objection was overruled by the Court; to which ruling of the Court the defendant, then and there, by counsel duly excepted, which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that it was customary for the miners to ride six at a time upon the skip, one of them sitting on the bail and cable (Tr. p. 51.)

II.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on direct examination as to the custom existing among the miners, with reference to the number of men who rode upon the said skip, to-wit:

Q. Always?

for the reason that the defendant was not bound in this case by any such custom and was not even bound by a direction to the men that any particular number should ride thereon. which objection was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted: which exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that a custom existed among the miners of always riding six on the skip, one of them riding on the bail and cable (Tr. p. 52.)

III.

The Court erred in overruling the defendant's objection

to the following question asked the witness, Nick Petrinovich, on direct examination, to-wit:

Q. Any bell system of signalling?

for the reason that it was not shown that the defendant had an insufficient system of signalling, but it was shown on cross-examination of witnesses that the signalling worked perfectly on all occasions except this one. The sufficiency of a system of signalling is a question of fact for the Court to determine and not a question for the jury to determine. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there, duly excepted; which exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that there was no bell system of signals and none except the "flash" system (Tr. p. 57).

IV.

The Court erred in overruling the objection of the defendant to the following question asked the witness, Harry Martin, to-wit:

Q. What was the condition of the cable on this hoist?

for the reason that the condition of the cable on this hoist could not possibly be the cause of this injury. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel, then and there duly excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection was to the effect that the cable was old and worn (Tr. pp. 77-78).

V.

The Court erred in denying defendant's motion for a non-

suit made at the close of plaintiff's evidence in the case, because the evidence adduced by the plaintiff was insufficient in the following particulars, to-wit:

(a) The evidence did not show any negligence on the part of the defendant which the proximate cause of the injuries sustained by the plaintiff.

(b) Upon the ground that, if the accident occurred by reason of anyone's negligence it was by reason of the negligence of a fellow servant, namely, the hoistman, and the other men in the skip who failed to give the signal, or the negligence of both the men in the skip and the hoistman.

(c) The plaintiff by his own testimony has shown that he was guilty of contributory negligence and assumed the risk by placig himself in an obviously dangerous position, to-wit, upon the bail and cable of the skip, whereas a safe position was open to him; which motion was denied by the Court; to which ruling of the Court the defendant by counsel, then and there, duly excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

VI.

The Court erred in overruling the defendant's objection to the following question asked the witness, O. D. Chism, on the direct examination of the said witness in rebuttal, to-wit:

Q. And one of them would ride on the bail?

for the reason that it was improper to show what the custom in this respect might be among the men of riding upon the bail. Which objection was overruled by the Court; to which said ruling of the Court the defendant by counsel, then and there, duly excepted; which said exception was allowed by the Court and which said ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection was to the effect that a custom of riding upon the bail and cable existed among the miners (Tr. p. 109).

VII.

The Court erred in overruling defendant's objection to the following question asked the witness, O. D. Chism, on direct examination in rebuttal, relative to the rule which existed among the men that one of them would ride upon the bail, to-wit:

Q. And that was the invariable rule?

for the reason that the defendant in this case was not bound by any rule or custom existing among the men of riding upon the bail. Which objection was overruled by the Court; to which ruling of the Court the defendant by counsel then and there, excepted; which exception was allowed by the Court; which ruling of the Court the defendant now assigns as error.

The substance of the evidence admitted over said objection being to the effect that a custom existed among the miners of riding on the bail and cable of this skip. (Tr. p. 109).

VIII.

The Court erred in refusing to instruct the jury to return a verdict for the defendant in this case as requested by the defendant for the following reasons, to-wit:

(a) It appears from all the evidence adduced in this case that there was no actionable negligence on the part of the defendant which was the proximate cause of the injury complained of in plaintiff's complaint.

(b) That, if the plaintiff was injured as complained of in his complaint, the injury was caused by his own want of care and his own negligence, and he assumed the risk of his employment; which said motion was denied by the Court;

to which said ruling of the Court the defendant by counsel, then and there, excepted; which said exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

IX.

The Court erred in giving the following portion of his oral instruction to the jury, to-wit:

“The failure upon the part of the plaintiff to use ordinary care is referred to as contributory negligence and the general rule is that if the defendant is negligent and that negligence contributes to the injury, and if the plaintiff is also negligent and his negligence contributes to the injury, he cannot recover. So that it is important for you to consider carefully the conduct of the plaintiff at this time. The mere fact that others may have ridden in the same position that he occupied that day is not conclusive of the question of his negligence or want of negligence. We know that not infrequently men in considerable numbers even take hazards, especially when they are working around dangerous machinery, or are handling dangerous instruments; they become somewhat used to these things and take risks that they should not take. And you should consider well here the particular form of this skip or car,—how it was attached to the cable; how it operated, its size, and the exact manner in which the plaintiff was located upon it at the time, the manner in which he received the injury, and say whether or not a reasonable man—I mean an ordinary reasonable man of ordinary prudence—would have taken the chances, or taken the risk, or occupied the position which he did, upon that car. You should in addition to that, take into consideration as one circumstance, that some others used it, and the testimony here of one of the witnesses that while he had ridden upon that

car, I think for something like three years, he stated that he had never occupied this position. All of these facts and circumstances are to be considered by you in determining whether or not the plaintiff himself acted carelessly and negligently in taking that position at the time of the accident."

To which portion of the said oral charge of the Court to the jury, and specifically that portion wherein the Court called the attention of the jury to the fact that they might take into consideration any custom which had existed on the part of the employees of the defendant in riding in the position in which the plaintiff was riding upon said skip at the time of the said injury, to-wit, upon the bail or the cable of the said skip, the defendant by counsel, then and there, duly objected and excepted for the reason that such custom did not exonerate the plaintiff from his contributory negligence, and assumption of risk by him; which said exception was duly allowed by the Court; and which said action of the Court in giving the said portion of the said instruction, the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE IS
INSUFFICIENT TO SUSTAIN THE VERDICT
OF THE JURY AND JUDGMENT THEREON

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injury to the plaintiff. While the evidence discloses that this particular hoist did not have any indicator upon it, at the same time it appears that the equipment of the hoist

and the signalling system had always been, and was then, sufficient for the purpose for which it was used, had proper use thereof been made by the fellow employees of the plaintiff. The evidence further discloses that the proximate cause of plaintiff's injuries was the fact that he was sitting and riding upon the bail and cable of the skip and that he would not have been injured in this accident but for the fact that he assumed an obviously dangerous position in which to ride thereon. The evidence conclusively shows that if the plaintiff had been sitting inside of the skip instead of upon the bail and cable, he would not have been injured, though the engineer failed to stop the skip at the station where the plaintiff was going to get off, but instead pulled the skip against the timbers, protecting the sheave-wheel.

(b) The evidence conclusively shows that the proximate cause of the plaintiff's injury was the negligence of a fellow-servant or servants. In this respect the evidence discloses that the signalling system provided by the defendant was sufficient for the safe operation of the said hoist. It had been used effectively immediately prior to the happening of the accident and immediately thereafter. That, had the plaintiff's fellow-employees riding upon the skip made proper use of the signal appliances at the time they came to the station where they intended to get off, or had the hoistman paid proper attention to the signal that was given, the accident would not have occurred.

(c) The evidence conclusively shows that the plaintiff voluntarily placed himself in an obviously dangerous position on the said skip, namely, upon the bail and cable thereof; whereas the evidence shows that he need not have placed himself in such a position, but could have ridden in the body of the skip. The evidence discloses further that a number

of men riding upon the said skip got off at the first level, and that there was ample room for the plaintiff in the body of the skip after these men had gotten off, but nevertheless he failed to avail himself of the opportunity to ride in a safe place in the skip, but continued to ride upon the bail and cable thereof. The evidence conclusively shows that no one upon the skip but the plaintiff was injured in this accident and that if he had ridden in the skip instead of upon the bail and cable, he would not have been injured. Consequently the plaintiff was guilty of negligence *per se* and assumed the risk, as a matter of law.

ARGUMENT.

The assignments of error may be grouped into five propositions and will be taken up in the following order:

FIRST PROPOSITION: The defendant in error was guilty of contributory negligence *per se* in riding upon the bail and cable of the skip, his so doing being the proximate cause of the accident and his consequent injury, or so far contributed thereto as to charge the defendant in error with contributory negligence as a matter of law. Under this head are grouped assignments of error Numbers V, (a-c), VIII, (a-b), together with specifications of the insufficiency of the evidence to sustain the verdict (a-c).

SECOND PROPOSITION: Error of the Court in admitting evidence as to the custom of men riding upon the bail and cable and the Court's instruction to the jury in reference thereto comprising assignments in error I, II, VI, VII and IX.

THIRD PROPOSITION: Error of the Court in admitting in evidence the fact that there was no bell system

or other system of signalling than the flashlight system covered by assignment of error Number III.

FOURTH PROPOSITION: Error of the Court in admitting evidence of the condition of the cable on this hoist covered by assignment of error Number IV.

FIFTH PROPOSITION: The accident was caused by the negligence of a fellow servant. Under this head is grouped assignment of error Number V (b) and specifications of the insufficiency of the evidence to sustain the verdict (b).

FIRST PROPOSITION.

The main ground relied upon by the plaintiff in error to reverse this case is that the defendant in error in sitting and riding upon the bail and cable of this skip assumed not only an obviously dangerous position, but the most dangerous position which could have been assumed by him, and in doing so he violated the positive prohibitions of a penal statute of the State of Idaho. As has been seen, the skip itself accommodated but five persons (Tr. p. 48). The defendant in error was riding upon the bail and cable (Tr. pp. 46-47-61-80-84): hence the defendant in error was not riding within or upon the skip, but outside of it on a bent piece of iron, fastened to the skip, and known as the bail, and as he himself testifies that in riding upon the bail it was necessary for him to lie upon the cable (Tr. pp. 80-84). That this is obviously the most dangerous place for a person to ride cannot, to our minds, be questioned, for the reason that none of the men riding in the skip were hurt (Tr. p. 50), and the defendant in error would not have been injured had he ridden inside of the skip (Tr. p. 51). Further than this, he had an opportunity of leaving his place on the bail

and cable and taking a seat within the skip after two of the men had gotten off on the fifth level (Tr. p. 50). Obviously any jar or slackening of the cable would throw a person, so riding, off, and put him in peril of being crushed or run over. His exceedingly cramped position does not give him any opportunity of avoiding these dangers. As in this case, the defendant in error obviously placed himself in a position where he could not help but be crushed in case the skip was hoisted too high or into the sheave timbers. That accidents of this kind, namely the drawing of the skip into the sheave timbers, do sometimes happen, is well known, both to the mine owners and to the employes and therefore precaution against the more serious accidents of drawing the skip into the sheave wheel has been taken by placing protecting timbers between the upper level and the sheave wheel (Tr. p. 45). Ordinary prudence suggests this course and everyone who is engaged or employed is familiar with these conditions.

But, aside from this, the extreme danger of occupying a position upon a bail or cable in riding up and down these hoistways has been taken cognizance of by the Legislature of the State of Idaho, which at its Tenth Session enacted a law proclaiming such danger, as a matter of public policy of the State of Idaho, thereby prohibiting any person from riding in such a position under the penalty of the law which makes such act a misdemeanor, and punishable as such. This act is found on Page 269, General Laws of 1909, Sec. 20, which reads as follows:

"It shall be unlawful for any person whether working for himself or whether he is in the employ of any other person, company or corporation, to ride upon the bail or cable of a hoisting bucket, cage or skip."

Therefore, our first proposition presents two phases, namely:

(A) The defendant in error assumed such a dangerous position which caused, or at least contributed, to his injury, that at common law and irrespective of the statute prohibiting him from riding in such position he is deemed to be guilty of negligence *per se* which prohibits him from recovering in this case.

(B) That at the time of being injured he was violating a positive statute of the State of Idaho in riding upon the bail and cable, which position caused, or at least contributed, to his injury, and that no employe who is acting while in violation of the provisions of such act can recover damages where it appears that such violation caused or contributed to his injury.

Therefore, we will take up, under our first proposition, these subdivisions in their order:

(A) As a matter of common law the position which defendant in error took in riding upon the bail and cable was negligence *per se*, which precludes his recovery. This proposition is sustained by the following authorities:

The Baltimore & Ohio Railroad Co. vs. Jones, 95
U. S. 439, 24 L. Ed 506.

Kresanowski vs. Northern Pacific Railroad Co., 18
Fed. 229.

Warden vs. Louisville etc. R. Co., 94 Ala. 227, 10 S.
276, 14 L. R. A. 552.

Downey vs. Chesapeake etc. R. Co., 28 W. Va. 732.

Houston etc R. Co. vs. Clemens, 55 Texas 88, 39
Am. Rep. 799.

Burns vs. Chronister Lumber Co., 87 S. W. 163
(Texas).

Tower Lumber Co vs. Brandvold, 73 C. C. A. 153,
141 Fed. 919.

Haynes vs. Ft. Dodge etc. R. Co., 118 Iowa 393, 92
N. W. 57.

Union Coal & Coke Co vs. Sundberg, 85 Pac. 319
(Colo).

Admitting that it was the duty of the plaintiff in error to have had an indicator upon the hoisting apparatus, and that it failed to have such an indicator, nevertheless such failure was not the proximate cause of this accident for no injury would have occurred to the defendant in error by reason of the skip being pulled into the sheave timbers, had he taken a position in the body of the skip. The evidence is clear upon the proposition that no one else upon the skip was injured, and had the defendant in error sat in the bottom of the skip he would not have been injured. His negligence in riding upon the bail and cable, therefore, was the proximate cause of his injury. Further than this, the assumption of such a position by him was such negligence, which, as a matter of law, precludes his recovery.

This doctrine has been announced by the Supreme Court of the United States in the case of *The Baltimore etc. R. Co. vs Jones*, (*supra*). This was a case where a railroad day laborer was riding from his place of work on the pilot of an engine. Sometimes a car was used for the purpose of conveying the laborers to and from their work, and sometimes only a locomotive and a tender was provided. It was common, whether a car was provided or not, for some of the

men to ride on the pilot or bumper in front of the locomotive. This appears to have been done with the approval of the man who was in charge of the laborers when at work,, and the conductor of the train which carried them both ways. The train on the evening of the accident consisted of a locomotive, tender and box car. When the party was about to return on the train that evening, the plaintiff was told by his boss to jump on anywhere; that they were behind time and must hurry. The plaintiff jumped on the pilot of the engine which ran into a train of cars. The Supreme Court of the United States found that the accident was the result of the negligence of the railroad company. It appeared, however, that no one else was hurt, but two other persons, one riding on the pilot with the plaintiff, and the other one standing on the car on the track. The Supreme Court said:

“The plaintiff had been warned against riding on the the pilot and had been forbidden to do so. It was, next to the cow-catcher, obviously a place of peril especially in case of collision. There was room for him in the box-car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent or direction of the company’s agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for him taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher or to put himself on the track before the advancing wheels of the locomotive. The company though bound to a high degree of care did not insure his safety.

He was not an infant nor non compos. * * * * *

He and another who rode beside him were the only persons hurt on the train. All those in the box-car where he should have been were uninjured. He would had escaped also if he had been there. His injury was

due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The plaintiff was not entitled to recover."

In *Kresanowski vs. Ry.*, *supra*, the plaintiff was injured while riding upon the pilot of the engine, by reason of a collision with another engine. The court held that he was guilty of contributory negligence as a matter of law, and in its opinion said:

"The Supreme Court of the United States has had this question before it in several different cases, and has laid down general rules that of course will control all inferior Courts of the United States in determining when it is a proper case for the action of the Court in giving a peremptory instruction to the jury to find for the defendant by reason of the fact that the plaintiff has failed to make out his case. I think it is apparent to everyone—it cannot be questioned—that a person placing himself upon the pilot of an engine certainly puts himself in a very dangerous position; there can be no more dangerous one to be thought of upon a train or upon a locomotive. It is apparent to everyone that it is a place that is exposed to the very greatest danger. In case of any accident there is scarcely any protection at all to prevent the party from being thrown off from the locomotive; it is not a place that is gotten up or intended to be used for the purpose of persons riding upon, and in case of collision where the collision comes from the front part of the engine, it is the place of all others that is exposed to the greatest danger. Now, I think it will strike the mind of any one that if a railway company should direct or require its employes to ride upon this pilot it is requiring them to ride in an exceedingly dangerous place; but if the employe himself places himself in that position the same rule applies to him; he has himself placed himself where there

is very great danger, and the query arises whether or not that is contributory negligence.

"Now, then, the evidence in this case shows that this locomotive was used for the purpose of transporting these employes and laboring men to and from the place at which they were engaged in their work. The employes knew that; they used it day after day, without complaint, so far as the evidence shows. There was no promise upon the part of the railroad company to supply them any different mode of transportation. They went upon this engine, and the evidence discloses the fact that they got upon the engine at different places; that is to say, they placed themselves upon different positions upon this engine; and among others they placed themselves on the pilot in front of the engine. The evidence does not show that that was done by the direction of any one in the employment of the company; that is to say, neither the engineer nor fireman, nor the boss in charge of the gang, ever directed that this should be done. It seems, as far as the evidence discloses the fact, to have been done by the men themselves; they chose to place themselves in that position. It is said, however, that one reason for it—and probably the reason that is assigned—is that the engine was so full of men that some of them, if they rode at all, were compelled to place themselves in that position, in front of the engine. Granting that position, we have this case: That here is the company furnishing this engine for the men to ride upon; the men go upon it, and continue doing so day after day, when it is apparent to them that if they all ride upon that engine some of them must ride upon that pilot, and they chose to do so, and they place themselves in that position. Now, then, they know the risks. It seems to me, within the rule of this case of *Hough* against the railroad company, they concluded to use the engine for the purpose of being transported upon it, after they had knowledge of the fact that if they did so that they would be placing themselves in a dangerous position. They must have known that fact."

Warden vs. Louisville etc. R. Co., supra, was a case where the plaintiff who belonged to the excavating gang rode on the pilot of the engine, as there was no room for him to ride elsewhere, and while so riding was injured in a collision. The Court held that the plaintiff was, as a matter of law, charged with contributory negligence and this would be so even if the plaintiff had ridden on the pilot by the direction of the company's agents. The Court said:

"The investigation of the Court and counsel have failed to disclose a single adjudged case to the contrary while many Courts are upon the record as holding either by analogy or directly that to ride upon the pilot or crossbeam in front of an engine, without justifying necessity therefor, involves *per se* such negligence as will defeat an action, counting upon injuries received while so riding and which would not have been received but for the plaintiffs being there."

Especially aggravated becomes the contributory negligence of the defendant in error in the case at bar when it is taken into consideration that there was ample room in the body of the skip after two of the men had vacated the same at the fifth level. Here an opportunity was afforded him to get into the body of the skip. If he had done so then he would and could not have been injured.

For this reason the case of Downey vs. Chesapeake etc. R. Co., supra, is quite analogous. In that case it appears that the railroad company carried its workmen to and from their place of work; that on a certain occasion the train was so crowded that plaintiff could not obtain a seat in the cars. That consequently he rode upon the pilot of the engine and was thrown therefrom and injured. It appeared that before the plaintiff was injured the train had stopped and he then had a reasonable opportunity, which was known to him,

of securing a seat in the car, as some of the seats had been vacated. In holding that the plaintiff was guilty of contributory negligence the Court said:

“If the company did not furnish him a safe means for his transportation he should not have accepted or voluntarily assumed one that was extremely dangerous. And having voluntarily assumed a dangerous means of transportation or position on the train it was clearly his duty to leave it at the first opportunity offered.”

Houston etc. R. Co. vs. Clemens, *supra*, was a case where a passenger took upon himself to ride in a baggage car. The Supreme Court of Texas there held that one who is injured in an accident while unnecessarily riding in a baggage car and who would have escaped had he been in a passenger car, cannot recover, it being obvious to anyone that a baggage car is a more dangerous place in which to ride than a passenger car.

In Tower Lumber Co., vs. Brandvold, *supra*, it was held that an employe on a logging train moving backwards, who rode on the front log car instead of on a flat car provided for the men, is negligent *per se*.

Another flat car case is Haynes vs. Ft. Dodge etc. R. Co., *supra*.

The case of Union Coal & Coke Company vs. Sundberg, *supra*, is a case quite analogous to the one at bar. There the men were in the habit of riding on the cars of an outside gravity tram. Although this practice was forbidden, nevertheless the officers of the company knew of the practice. Most of the men rode inside of the cars, but the plaintiff's interstate on the occasion of the accident rode standing with one foot upon the bumper of the front car and the other foot resting upon the cable. He was thrown off

and run over. No one else upon the train was injured and had he ridden in the body of one of the cars he would not have suffered any accident. The Court in a very able opinion, following the authorities laid down in the pilot and other railroad cases, held that in assuming the position which plaintiff's interstate did he was guilty of negligence *per se* and was the author of his own misfortune.

(B) The defendant's violation of a positive statute, by riding upon the bail and cable which was the proximate cause, or at least contributed to his injury, precludes him from recovery in this case. This is supported by the following authorities:

- Lloyd vs. N. Carolina R. Co., 66 S. E., 604 (N. C.).
- Riley vs. Pittston Coal Mining Co., 73 Atl. 944 (Pa.)
- Morris Coal Co. vs. Donley, 76 N. E. 945 (Ohio.)
- Little vs. Southern R. Co., 66 L. R. A. 509 (Ga.)
- Consolidated Coal etc. Co., vs. Clay's Adm'r. 38 N. E. 610, 25 L. R. A. 848 (Ohio).
- Chicago etc. R. Co., vs. Snyder, 7 N. E. 604 (Ill.)
- Beaucoup Coal Co., vs. Cooper, 12 Ill. App. 373.
- Voshefskey vs. Hillside Coal Co. & I. Co., 21 App. Div. 168, 47 N. Y. Supp. 386.
- McGrath vs. City & Suburban R. Co., 20 S. E. 317 (Ga.)

The case of Lloyd vs. The North Carolina R. Co., *supra*, was a case where the plaintiff was an employe of the defendant railway and had worked twenty-four hours in violation of the Federal sixteen hour law. He alleged in his

complaint that by reason of his having worked so long he had become tired and worn out so that he did not have his faculties remaining when he endeavored to climb on a freight car of the defendant to ride home. He alleged as negligence that the defendant had caused wrongfully, negligently and unlawfully to be piled certain material along the track, of which he was not aware, and over which he stumbled in his weakened condition and fell under the cars of the defendant, sustaining very severe injuries. The Court said:

"It is very generally held, universally so far as we are aware, that an action never lies when a plaintiff must base his claim, in whole or in part, on a violation by himself of the criminal or penal laws of the state. In 1 Waite's Actions and Defenses, p. 43, the principle is broadly stated as follows: 'No principle of law is better settled than that which declares that an action cannot be maintained upon any ground or cause which its law declares to be illegal,'—citing numerous cases."

Riley vs. Pittston Coal Mining Co., *supra*, was a case where a boy seventeen years of age attempted to oil dangerous machinery while in motion, in violation of the prohibition of the Pennsylvania Statute. The lower Court held the rule of law to be that it matters not how negligent the defendant may be, if the plaintiff himself is negligent in slightest degree which injured or resulted in or caused him the injury for which he brings the action, he cannot recover. From this holding the appeal was taken. The Appellate Court held:

"He, (plaintiff), had just finished oiling one box and as he started around the revolving wheel to oil another, slipped and caught in the moving machinery.

Being of age that made his employment lawful, his contributory negligence stands in the way of his recovery. *Lenahan vs. Pittston Coal Mining Co.*, 218

Pa. 311, 67 Atl. 642, 12 L. R. A. (N. S.) 461, 120 Am. St. Rep. 885.

"It is next contended that, even if it be conceded that the appellant is to be regarded as having been engaged in the work of oiling at the time he was injured, his act was not the proximate cause of his injury and did not contribute to it, the same having resulted from an intervening cause—the negligence of the defendant in not providing him a safe place to work. We are not prepared to say that such negligence was shown on the part of the defendant, and it is not necessary that we pass upon that question; for complaint cannot be made by a servant that a safe place was not provided for him when he is injured in doing that which he was expressly forbidden to do either by his master or by the written law of the land. What happened to this appellant could not have happened if he had not been doing a prohibited thing."

Consolidated Coal & Mining Co. vs. Clay's Adm'r., *supra*, was a case where a coal miner had been working, drilling holes in a coal mine without first having propped and supported the roof by means of timbers and props, in violation of a statute of the State of Ohio making it a misdemeanor for any miner who intentionally and wilfully neglects or refuses to securely prop the roof of any working place under his control. It appeared in this case that a custom had arisen whereby this work was done by a man called Dalton, who was called a "filler." The Court in rendering its opinion said:

"Another proposition argued in that the trial Court

erred in refusing to give to the jury instruction Number 10, asked by the defendant, which instruction is as follows:

“The defendant asks the Court to say to the jury that if they find from the evidence that Clay was in control of the room where he got killed, that then under the criminal statute, Sec. 687, Revised Statutes of Ohio, it was his duty to properly post the room, and no custom existing at the time at the mine could relieve him of that duty.’

“Upon this point in its general charge the Court said to the jury that if they found that Clay,—‘violated a criminal statute for which violation he could have been prosecuted had he lived, such violation will not preclude a recovery in this action.’ * * * *

“The section of the Revised Statutes referred to provides among other things that—‘whoever, willingly, does any act whereby the life or health of the persons, or the security of any mine or machinery are endangered, or any miner or person employed in any mine governed by the statute, who intentionally and wulfully neglects to securely prop the roof of any work-gin place under his control, shall be guilty of an offense,’ etc. The same section makes it the duty of the mine owner to keep at the working place of the miner a supply of timber suitable for posting. No doubt exists that the statute applies to this mine.”

The Court therefore held that as a matter of law the plaintiff could not recover.

Morris Coal Co. vs. Donley, *supra*, was a case where the plaintiff was a miner in the employ of the defendant and had started to drill in defendant's coal mine without first having propped the roof, the statute making it a misdemeanor for any miner to fail to prop and support the roof before attempting to work. The plaintiff relied upon the proposition that the space in which he was working did not permit of timbering, owing to its narrow confinement, and

that he had been directed to work there by the defendant under the assurance that the defendant had inspected the place and that the place was a safe place in which to work. The Supreme Court of Ohio in rendering its decision approved the rule laid down by it in the case of Consolidated Coal etc. Co. vs. Clay's Adm'r., *supra*, and held that the plaintiff had placed himself, in violation of the express inhibition of the statute, in a dangerous place and that such violation of the statute precluded him from recovery.

Little vs. Southern Railway Co., *supra*, was a case where the plaintiff sued the defendant railway company for injuries received in a collision between two switch engines. The plaintiff was the engineer upon one of these engines. He was at that time running at the rate of from eight to ten miles per hour in violation of the city ordinance of Macon, which prohibited running of trains and cars within the city limits at a greater rate of speed than five miles per hour. He was at the time running under orders from the defendant company. The plaintiff was also guilty of a violation of a state statute requiring the engineer to check his speed at street crossings. The Court said:

“After the plaintiff had stopped his train beyond the railroad crossing and was unsuccessful in his attempts to back the cars, he started forward at a speed estimated by the witnesses as from eight to twenty miles an hour, crossing two streets in the City of Macon without checking the speed of his train. The Court charge, Civil Code, Pars. 2222-2224, requiring an engineer to check the speed of his locomotive within four hundred yards of such crossings so as to be able to stop in time should any person or thing be crossing the track; and in this connection the Court instructed the jury that if they believed that the failure of the plaintiff to observe this statutory requirement was the

proximate cause of his injury, he would not be entitled to recover. * * * * * The statute makes it the duty of the engineer, and indeed of the railroad company, to blow the whistle and check the speed of the train. If he fails to do this as required by the statute he is subject to indictment for a misdemeanor; and if, in the commission of this criminal act, an injury results which could have been avoided but for the commission of that act, his right to recovery from the railroad company will be defeated. 1 Lablatt, Mast. and S., paragraph 362; Missouri K. & T. R. Co. vs. Roberts (Tex. Civ. App.) 46 S. W. 270. The same may be said as to the violation of the speed ordinance of the City of Macon, which prohibits the running of trains in that portion of the city at a greater rate than five miles per hour. The plaintiff admits that at the time he sustained an injury the speed of his train was from eight to ten miles an hour. When he collided with the other engine he was in actual violation of the speed ordinance of that city. He had just passed two street crossings without checking the speed of his train or attempting to do so. He rushed towards the impending collision in disobedience of the State statute requiring him to check the speed of his locomotive at street crossings, and in disobedience of the municipal ordinance limiting him to the speed of five miles an hour. If his injury was caused by reason of a violation of either the statute or the ordinance he would not be entitled to recover."

Chicago etc. R. Co., vs. Snyder, *supra*, was a case where the deceased had been an employe of one of the defendant railway companies, and was conductor upon one of the trains which came into collision at a crossing with a train of the other defendant corporation. The evidence was conflicting as to whether or not the train of the deceased had come to a stop prior to attempting to cross the tracks of the other defendant railway company. Under this conflict of the

evidence the defendant, Chicago, Milwaukee & St. Paul Railway Company, asked the following instruction which was refused:

"The Court further instructs the jury that the law requires all trains upon any railroads in this state, which crosses or intersects or is crossed by any other railroad upon the same level, shall be brought to a full stop at a distance not less than two hundred feet, nor more than eight hundred feet from the point of intersection or crossing of such road. And if the jury find from the evidence that the train of the Chicago & Northwestern Railway Company, under the charge of the deceased as conductor of said train, was not brought to a full stop at a distance of more than two hundred feet from the crossing of the tracks of the Chicago, Milwaukee & St. Paul Railway Company, and if you further believe from the evidence that the failure to stop at said distance from said crossing contributed to the injury complained, or if you believe from the evidence that had said train been brought to a full stop at said distance from said crossing, the collision would have been avoided, then you must find for the defendant Chicago, Milwaukee & St. Paul Railway Company."

The Court said:

"There is a conflict of the evidence in regard to the point where Snyder's train was stopped before making the crossing * * * * but, however, the fact may be the evidence was such that the defendants had the right to go to the jury on that question with proper instructions from the Court. * * * * The statute imposed the duty on Snyder who had charge of the train to bring his train to a stop not less than two hundred feet from the crossing. If he failed to comply with this requirement of the law, and such failure contributed to his injury, it is plain that plaintiff could not

recover for the obvious reason that the plaintiff was guilty of negligence which contributed to the injury. In refusing this instruction, the Court in fact held, that the defendants were liable although the jury might find from the evidence that if Snyder had observed the duty enjoined by the statute, the collision might have been avoided. We do not understand this to be the law."

In *Beaucoup Coal Co. vs. Cooper*, *supra*, it was held that under the statute declaring it to be the duty of the "owner, agent, or operator" of a mine, to put catches on the cage at the top of a shaft the failure of the "pit boss" to see that such catches were put on was held to be such contributory negligence as would bar a recovery for his death, caused thereby.

In the case of *Voshefskey vs. Hillside Coal & I. Co.*, *supra*, where it was held that a miner who transgressed the statute prohibiting all persons from riding on loaded cars could not recover.

McGrath vs. City & Suburban R. Co., *supra*, was a case where, in approaching the point where the injury occurred the driver of a wagon was engaged in violating a city ordinance by driving at a prohibited rate of speed, and the circumstances being such as that, if this violation had not occurred the negligence of the defendant would not have produced the injury. The court held that a nonsuit was properly granted.

The Court therefore erred as alleged in our assignment of error V (a-b), in denying our motion for a nonsuit, and erred as alleged in our assignment of error VIII (a-b), in refusing to instruct the jury in this case to render a verdict for the defendant. And it appears that the evidence is insufficient to sustain the verdict and judgment thereon in the particulars specified in our specifications (a-c) upon that point.

SECOND PROPOSITION.

The Court below admitted evidence as to the custom of more than five men riding upon the skip and especially as to the custom of the sixth man riding upon the bail and cable. (Tr. pp. 51-52-109), and instructed the jury that they might take such evidence of custom into consideration in determining whether or not the defendant in error was guilty of contributory negligence in this case (Tr. pp. 116-117).

We maintain that the fact that other employes may have been in the habit of riding upon this bail and cable constitutes no excuse whatsoever for the defendant in error having assumed such an obviously dangerous position. In this we are sustained by the following authorities:

Railroad Company vs. Jones, *supra*.

Kresanowski vs. N. P. R. Co., *supra*.

Glover vs. Scotten, *supra*.

Consolidated Coal & Mining Company vs. Floyd,
supra.

Little vs. Southern Railway Company, *supra*.

Morris Coal Company vs. Donley, *supra*.

In B. & O. R. Co. vs. Jones, *supra*, it appeared that it was common whether a car was provided or not for some of the men to ride on the pilot or bumper in front of the locomotive, and that this was done with the approval of Van Ness, who was in charge of the laborers when at work, and further, when on the evening of the accident Van Ness had told the plaintiff to jump on anywhere that they were behind time and must hurry. The Supreme Court of the United States say:

"The knowledge, assent or direction of the company's agent as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might have he obeyed a suggestion to ride on the cowcatcher, or put himself on the track before the advancing wheels of the locomotive."

In the case of *Kresanowski vs. N. P. R. Co.*, it appeared that the tender of the engine furnished by the defendant for the plaintiff to ride in was full and that he, with one or two others, sat on the front beam with his feet over the pilot. The evidence showed that this engine was furnished by the railroad company to transport them from their place of work; that employes got upon the engine at different places, among others they placed themselves upon the pilot of the engine. In basing his decision that the plaintiff was precluded by his own contributory negligence from recovering upon the doctrine as announced in the case of *Jones vs. The B. & O. R. Co.*, *supra*, Mr. Justice Shiras said:

"Now the Court there (*R. Co. vs. Jones*) held that it would make no difference in the ruling if it should be shown that the plaintiff had occupied this position upon the pilot with the knowledge, assent, or even by the direction of the company's agents. They hold that as immaterial; that those things would be no justification for his taking the risk."

In *Morris Coal Company vs. Donley*, *supra*, it was held that the fact that it was impracticable to prop the roof of the mine where plaintiff was working did not justify his violating to the positive commands of the statute that the roof must be propped.

In *Consolidated Coal & Mining Company vs. Clay's Adm'r*,

supra, which was another case of violation of the mining statute providing that the roofs of mines must be propped by the miners, the Supreme Court of Ohio said:

“ * * * * * it would seem to follow that the custom set up in the petition ought not to be held to have absolved the deceased from the obligation enjoined by the statute. The object of the statute is to encourage carefulness; regarded not only for the life of the miner, but the lives of all who may be subjected to like risks. It imposes an obligation to perform a duty to others. Anything therefore which tends to operate in opposition to that obligation would violate the policy of this state and hence whatever right the custom at this mine, of imposing upon Dalton the work of propping and posting the roof of the room, may have given Clay to call upon Dalton to do the manual work of posting, and delay his own work until that had been properly done, such custom ought not to have the effect to exonerate Clay from the duty enjoined by the statute nor shift the risk undertaken by himself over upon the company.”

In the case of *Little vs. Southern Railway Co.*, supra, which was the case of violation of the speed ordinance, the Supreme Court of Georgia says:

“But he (plaintiff) says that he was commanded by the railway to disobey both the statute and the speed ordinance, and that, even if there was no express command to that effect, there have been such repeated violations as to amount to a custom. It would be contrary to public policy for Courts to relieve a citizen of the consequences of his act in violating the law or his duty to society and it cannot be any defense that someone else either assisted in the offense or commanded him to do it. *Missouri K. & T. R. Co. vs. Roberts*, (Tex. Civ. App.) 46 S. W. 27. It is no justification for one crim-

inally responsible for his conduct that another commanded him to do an act which is inhibited by law. No custom, however universal, could have the effect of repealing a penal statute and the mere forbearance of the corporation to prosecute for repeated violation of the ordinance would not amount to an implied repeal of the ordinance * * * * * It follows that, if the railway company either commanded or connived at a violation of the penal law, the plaintiff who was the actual perpetrator could not recover of the defendant for an injury traceable to the violation of the statute."

We therefore contend that the Court erred in admitting evidence of custom as alleged in our assignments of error Numbers 1, 2, 6 and 7, and the Court further erred in instructing the jury as alleged in our specification of error Number 9 to the effect that they should take such evidence of custom as had been introduced into consideration in determining whether or not the defendant in error was contributorily negligent in assuming a place upon the bail and cable.

THIRD PROPOSITION.

We next contend that the Court erred in admitting evidence to the effect that there was no other signalling system than the flashlight system and that no bells had been installed. (Tr. p. 57). We cannot conceive how the failure to install a bell system of signalling could have in any way been responsible for this accident, or that if such system had been installed this accident would not have occurred. It appeared that the flashlight system was adequate for all purposes; that it had been successfully used just prior to the accident and immediately subsequent thereto. The admission of such

evidence was certainly prejudicial to the plaintiff in error for plaintiff in error's failure to install such a Bell system was wrongfully paraded before the jury. Every lawyer knows just how prejudicial the introduction of such testimony is to the case of a corporation who defends a case for personal injury, and the greatest care should be exercised to exclude such evidence which has a tendency to wrongfully prejudice a jury against a defendant.

FOURTH PROPOSITION.

The same argument may be applied to the admission of evidence respecting the condition of the cable. (Tr. pp. 77-78). It cannot be conceived how the condition of this cable in any way contributed to this accident, or how a different or other cable than the one used would have avoided the accident. It makes no difference whether this cable was old or new. It certainly appears from the evidence that though the skip was pulled by the hoist into the sheave timbers, nevertheless, the cable was so strong that it did not break and therefore sufficient for the only use to which it was put or intended. We therefore insist that the evidence of a defective cable was wrongful and prejudicial to the plaintiff in error, admitted before this jury, and that such admission is at least partially responsible for the verdict in this case.

FIFTH PROPOSITION.

The accident was caused by the negligence of a fellow servant. The evidence shows that the hoist operator ran the skip up this incline at an excessive rate of speed so that wit-

ness Chism, who attempted to pull the cord and give the signal, was unable to do so and to give an effective signal in the limited time in which he had. (Tr. pp. 44-45). That the hoist man and the men riding in the skip, including the plaintiff, were fellow servants, cannot be questioned, and for the negligence of the hoist man in drawing this skip up this incline at such an excessive rate of speed that it was impossible to give a proper stopping signal at the top station, and thereby causing this accident, the master is not responsible.

It is therefore clear to our minds that this accident was caused by the negligence of a fellow servant concurring with the grossest sort of contriutory negligence on the part of the defendant in error, in this case.

Therefore the Court should have granted the motion of plaintiff in error for a nonsuit as assigned in specification of error V (b) and it appears that our specifications of the insufficiency of the evidence to sustain the verdict and judgment thereon are likewise well taken.

Respectfully submitted,

FEATHERSTONE & FOX,

Wallace, Idaho.

Attorneys for Plaintiff in Error.

9

United States Circuit Court of Appeals

FOR THE
NINTH CIRCUIT

THE FEDERAL MINING & SMELTING COMPANY, a corporation, <i>Plaintiff in Error,</i> <i>vs.</i> C. H. HODGE, <i>Defendant in Error.</i>	}	No. 2325.
---	---	-----------

*Brief of Defendant in Error on Writ of Error
to the United States District Court of
the District of Idaho, Northern
Division.*

F. C. ROBERTSON,
FRED MILLER,
Spokane, Washington,
WALTER F. MORRISON,
Coeur d'Alene, Idaho,
Attorneys for Defendant in Error.
FEATHERSTONE & FOX,
Wallace, Idaho,
Attorneys for Plaintiff in Error.

For brevity we will refer to the Defendant in Error as the Plaintiff and to the Plaintiff in Error as the Defendant.

Figures in () refer to pages of the Transcript of the Record.

STATEMENT OF THE CASE.

The plaintiff in his complaint assigned negligence of defendant in failing to have any indicator on the hoist so that the hoistman would know the location of the skip, in not having any proper system of signals for stopping the skip; that the skipway was improperly lighted, the cable was old and uneven in size and did not wind evenly around the drum, or to provide proper rules for the operation of the skip.

The plaintiff with five other employees got into the skip and when the employee in charge of the skip saw it was going past the station at the top, signalled to the hoistman to stop, or attempted to signal to him. The signal system is described in the testimony of Chism (pages 44 and 45). The hoist did not have any indicator on it (57). The offices of the indicator are to disclose the position of the

skip (62 and 63), and with the flash system of signals the hoistman has no means of knowing the location of the skip if the flash does not work (66). That the flash lights do not always respond is established by the evidence of Ashby (70 and 71).

A hoist is not properly equipped unless it is provided with both an indicator and a signal.

The cable was old, did not wind evenly on the drums and was covered with mud (78). This according to the testimony of Mr. White (100-101-102-103 and 104). On page 104 the witness, who was the Chief Engineer for the Company, testified that a signal system which would not respond was not a safe system.

DEFENDANT'S ASSIGNMENTS.

I.

No. 1 is based on the overruling of an objection (page 7, brief) to inquiry as to any custom. This question appears on page 52 of the Transcript, but there does not appear to be any objection to it. This testimony was for the purpose of showing that the company always, or as long as the skip had been in operation, had operated it in the same way it

was on the date in question and that the bail had been habitually used for one of the men to ride on. It was not the fact of his riding on the bail which caused the accident but the negligent running of the skip into the timbers. At any rate, this evidence was not prejudicial, for on page 48 counsel, on cross-examination, interrogated the same witness and brought out the evidence that six men always rode in the skip, one of them on the bail.

II.

The question "Always?" appears to have been objected to and the objection overruled, but the question was not answered. If not answered certainly the overruling of counsel's question would not be prejudicial.

III.

This relates to a question found on page 57: "Q. Any bell system for signalling?" The objection was "It is shown that we have a sufficient system of signalling."

We don't understand this to be an objection, simply an indirect manner of counsel establishing for his client the sufficiency of their system.

IV.

This assignment is based upon this question: "What was the condition of the cable on this hoist?" There was no objection to this question and the following question asked for explanation of the answer when counsel for defendant again took the stand and testified as follows: "I object, if your honor please, it couldn't possibly be the cause of the injury." If any one was prejudiced it was the plaintiff, but on page 78 the witness testified that because of the bad condition of the cable it did not wind evenly on the drum.

V.

This assignment relates to the refusal of the court to grant a non-suit.

A reference to pages 112 and 113 will show that counsel did not renew this motion at the close of all the testimony in the case and has therefore waived it.

VI.

This assignment relates to this question: "Q. And one of them was on the bail?" This question was not objected to. An objection was submitted to the following question,

but it was not answered. Therefore, there could be no prejudice to defendant.

VII.

The question complained of in the assignment was not answered.

VIII.

This assignment relates to the refusal of the court to instruct the jury to return a verdict for the defendant:

(A) That there was no actionable negligence which was the proximate cause.

(B) Because plaintiff was guilty of contributory negligence and assumed the risk.

We don't know just how this question arose, whether upon requested oral or written instructions. At any rate they both relate to matters of fact and not questions of law.

IX.

This relates to a charge which was not given by the court.

ARGUMENT.

We feel that any reference to Assignments of Error I, II, III, IV, V, VI, and VII, would not serve any useful purpose, because

they all relate to the admission of evidence where no objection or exception was received, with the exception of V, which relates to the refusal of the court to grant a non-suit. This assignment is waived by failure of the defendant to renew the motion at the close of all the evidence.

Assignments VIII and IX have been heretofore referred to and even if defendant had preserved its record so that an error based upon said assignments could have been reviewed, the instruction refused, on page 11 of the brief, which did not appear in the record, as well as the instruction given on page 12, was not error.

Beginning on page 16 counsel refers to page 269 of the Session Laws of Idaho, Section 20, relating to employees riding upon the bail of a hoisting bucket, cage, or skip. Upon this subject we feel it would not be fair to the trial court for this court to review any matters which were not presented in the court below. The question of the effect of this statute was never presented to the able trial judge, who presided, and therefore he did not commit any error relating thereto. As has

been frequently said, this court is one for the correction of errors committed by the trial court. This was decided squarely in the case of *Lake County, Colorado, vs. Sutliff*, 97 Fed. 270. On page 275 the following language was used:

“Were the issues or points in controversy in this action actually raised and litigated in the former suit? This question was never presented to the trial court by plea, proof, or request for an instruction to the jury, and no exception was ever taken, no error was ever assigned, to any ruling upon it. It is, therefore, not here for our consideration. In an action at law, this is a court for the correction of the errors of the court below, conclusively. Questions which were not presented to, or decided by, that court are not open for review here, because the trial court cannot be guilty of error in a ruling that it has never made upon an issue to which its attention was never called. Citing *Ry. Co. vs. Henson*, 19 U. S. App. 169, 7 C. C. A. 349; *Phillip Schneider Brewing Co. vs. American Ice Mach. Co.*, 40 U. S. App. 382, 23 C. C. A. 89, 77 Fed. 139; *Manufacturing Co. vs. Joyce*, 4 C. C. A. 368, 54 Fed. 332.”

And again in the case of the *Charleston Ice Manuf'g Co. v. Joyce*, 54 Fed. 332-333, the following language was used:

“The necessity for this rule is so apparent, and the rule itself is so universally enforced

by the courts, that further consideration of the question is not required of us. The following cases show the practice to be as we have stated, and demonstrate its wisdom and the importance of adherence to it. *Camden v. Doremus*, 3 How. 530; *Harvey v. Tyler*, 2 Wall. 328, 339; *Beckwith v. Bean*, 98 U. S. 266, 284; *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. Ct. Rep. 313; *Moulton v. Insurance Co.*, 111 U. S. 335, 337, 4 Sup. Ct. Rep. 466; *Burley v. Bank*, 111 U. S. 216, 4 Sup. Ct. Rep. 341; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. Rep. 832; *Railroad Co. v. Charles*, 51 Fed. Rep. 562, 571. We think it clear that the court below properly overruled the general objection made during the trial, as recorded in the bill of exceptions, and it is equally as clear that this court cannot, on writ of error, consider the specific objections made before it, and not presented to the court below."

We do not understand that this court will take judicial knowledge of what the statute of Idaho is, but, inasmuch as counsel has cited it we also desire to call the court's attention to Sections 12 and 15 of said Statute, which are as follows:

Section 12:

"Whenever a steam, electric, gas, air or water-driven hoist is used in handling of men, in mines, it shall be equipped with an indicator placed in clear view of the hoist engineer, and geared positively to the shaft or drum of the hoist and so adjusted with dial

or slide as to provide a target or indicator that will at all times show the exact location of the bucket, cage or skip."

Section 15:

"Every mining property using hoisting apparatus within the State of Idaho shall keep one copy of this entire code posted on the gallows frame, and a copy of the bell signals before the hoisting engineer, and on each station."

Section 29 relates to fine for failure of corporation to comply with this statute.

NO ASSIGNMENTS BASED ON THIS STATUTE.

The Assignments of Error begin on page 125 of Transcript of Record and end on page 133. In none of these is any reference made to the statute. In the specifications, page 131, there is no reference to the statute.

Before a ruling, or error, can be relied on in this court it must have been urged in the trial court and incorporated in the Assignments of Error.

In the case of *City of Findlay vs. Pertz*, 74 Fed. 681, a statute of the State of Ohio was involved. In the appellate court it was urged that the statute invalidated a certain

municipal contract. In disposing of the question the court said:

“It is enough to say that a careful examination of this record shows that this question is now for the first time raised. * * * The question is not presented by any assignment of error * * *. To have obtained the benefit of a consideration of this question it should have been presented to the trial court. * * *. To have obtained the benefit of any error in respect to the action of the Circuit Court below in failing to give effect to this Ohio statute, there should have been some specific assignment, definitely pointing out the action of the court against which the complaint is made.”

Having studiously avoided any reference to the statute on motion for non-suit (87-88), having failed to move for a directed verdict on that ground at the close of all the evidence (112) and having failed to request any instruction or make any assignment of error it cannot now be raised. While we are confident of our position on this question, we submit, however, that there is no evidence of the defendant company having complied with the statute relative to posting the notice of its regulation. It is not such a statute that knowledge of it is presumed, being in the nature of a regulation. Evidently the Legis-

lature regarded it as a regulation for they directed its posting for information of the employees. Again we do not understand that the position of the plaintiff in the skip was the cause of the injury. This was not a question of law, but one of fact and the statute would not aid the defendant. Anyway we would question the authority of the Legislature to make the manner in which an employee does his work a criminal act.

WHETHER DEFENDANT WAS NEGLIGENT: WHETHER PLAINTIFF WAS NEGLIGENT AND PROXIMATE CAUSE OF THE INJURY.

We have shown that there was no indicator on the hoist and that the cable was old and did not wind evenly on the drum. Because of the absence of the indicator the hoistman could not know the position of the skip in the skipway and ran it into the timbers at the top. We have also shown that the defendant required six employees to ride in the skip at a time, one the same way the plaintiff was riding (47-52). That being the unvarying custom in the mine, with the full knowledge of the persons in charge, the defendant

company cannot claim that any instructions were violated which would prevent the plaintiff's recovery. The mere fact that the plaintiff was the only one injured is no proof of his negligence. They had been riding in this same position ever since the skip had been in use.

This court has passed upon the identical question in the case of *Olson vs. Cook Inlet Coal Fields*, 121 Fed. 626. The plaintiff in that case was sitting between the engine and the first car of a string of coal cars, and this court in reversing the District Court of Alaska held that the question of contributory negligence was plainly one for the jury. The position of the plaintiff had nothing to do with the cause of the accident. The cause of the accident was the failure of the defendant company to properly equip the hoist.

In the case of *Alaska United Gold Mining Co. vs. Keating*, 116 Fed. 561, this court said:

“With respect to the defense urged that the plaintiff was guilty of contributory negligence, it is necessary to understand what constitutes contributory negligence in a case of this character. It is the want of ordinary care and prudence on the part of the person injured by the actionable negligence of another.

combining and concurring with that negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. 7 Am. & Eng. Enc. Law (2d Ed.), p. 371. Assuming that the presence of an obstruction in the shaft ought to have been ascertained by the defendant before the skip on which plaintiff was riding was sent down, and that this omission was the negligence of the defendant, then it is clear that the plaintiff's position on the skip, although it may have been dangerous, was not a proximate cause of the injury, as it did not combine or concur with the defendant's negligence in causing the injury."

CONCURRING NEGLIGENCE.

It is strenuously insisted by counsel that the negligence causing the injury was that of the hoistman. The hoistman testified that he did not get the signal (77). He also testified that the cable did not wind evenly on the drum. The man in charge of the skip testified (44 and 45) that he endeavored to give the signal, which shows the signal apparatus was not sufficient. The testimony is all to the effect that if there had been an indicator on the hoist the hoistman could have known at all times the position of the skip.

Mr. White, the foreman of the mine, on cross-examination (103-104), testified that a

signal system of this kind would not be proper if the signal was given and the light did not flash below and further testified that an indicator was an assistance for the hoistman in locating the position of the skip.

Any construction which can be placed upon the evidence must place the blame upon the defendant company for failure to employ proper machinery to be used in the mine. We fail to see where any negligence is attributable to either the hoistman or the man in charge of the skip. Even if it were conceded that one or the other was negligent in some particular, yet, that is not a defense, because it was established that the defendant company was negligent, and where the negligence of a fellow servant concurs with that of the master the defense of fellow servant cannot be invoked.

Grand Trunk R. Co. vs. Cummings, 106
U. S. 700.

We respectfully submit that the defendant company has not reserved exceptions entitling it to urge any of the objections raised in the brief, especially upon instructions given or requested, evidence admitted, or the Statute

of Idaho cited in the brief. Upon the other question of contributory negligence and proximate cause, the question was clearly one for the jury. The fellow servant, which was not established by the evidence, is not, in our opinion in the case, and if it is, only in the way of concurring negligence.

The judgment should therefore be affirmed.

F. C. ROBERTSON,

FRED MILLER,

WALTER F. MORRISON,

*Attorneys for Defendant
in Error.*